Supreme Court, U. S.
FILED
JUN 5 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1528

Botany Industries, Inc.

and

Michael Daroff,

Petitioners,

v.

The First National Bank of Boston

and

Max Robb, Trustee in Bankruptcy
of Botany Industries, Inc.

and

Statutory Creditors Committee of
Botany Industries, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ISAIAH W. CRIPPINS,
Attorney for Petitioners.

PRESS OF ALLEN, LANE & SCOTT, INC., PHILADELPHIA

IN THE

Supreme Court of the United States

Botany Industries, Inc., Bankrupt
and
Michael Daroff

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION

The petitioners, Botany Industries, Inc. and Michael Daroff respectfully pray that a writ of certiorari issue to review the order of The United States Court of Appeals for the Third Circuit affirming the order of the United States Court of the Eastern District of Pennsylvania.

OPINIONS BELOW

The Judgment Order was entered by the United States Court of Appeals for the Third Circuit on February 13, 1975, in fact, less than three hours after argument on the merits had been heard. A timely petition for a rehearing was filed and was denied March 6, 1975. No opinion was issued or filed by the United States Court of Appeals for the Third Circuit for either its judgment order of February 13, 1975 or its denial of the motion for rehearing on March 6, 1975. No opinion was issued by the District Court upon its order of December 2, 1974 by Judge John Morgan Davis.

JURISDICTION

This is a bankruptcy proceeding and jurisdiction is invoked under 28 USC Section 1254.

QUESTIONS PRESENTED

1. Whether or not there is any such *rari avis* as a motion of summary affirmance by a United States Court of Appeals of a Judgment Order of a lower court.

2. Can an agent or sub-agent of a trustee in bankruptcy validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee?

STATEMENT OF THE CASE

Glenoit Mills, Inc. is a wholly owned subsidiary of Botany Industries, Inc., the bankrupt. In order to obtain operating capital, Botany Industries, Inc., had pledged the stock of Glenoit Mills, Inc. to The First National Bank of Boston. For many years Clarence Hafford had been an executive officer of Botany Industries, Inc. and the president of Glenoit Mills, Inc. Immediately prior to the bankruptcy of Botany Industries, Inc. Clarence Hafford resigned as an executive officer of Botany Industries, Inc. but remained the president of Glenoit Mills, Inc., the wholly owned subsidiary of Botany Industries, Inc. During the entire bankruptcy proceedings he has remained the chief executive officer of Glenoit Mills, Inc. He has continued in such capacity even until this day. The trustee decided to sell Glenoit Mills, Inc. He sold it to Clarence Hafford. This gives rise to Question #2 of the questions presented—Can an agent or sub-agent of a trustee in bankruptcy validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee? Two Circuits have answered negatively to this question. The Second, The United States Court of Appeals for the Second Circuit in the case of Wolverton *v.* Shell Oil Company, 1971, 422 Fed 2nd, Second Series, 666. The Ninth Circuit answered the question negatively. Donovan and Schuenke *v.* Paul W. Sampsell, 226 Fed 2nd, Second Series, 804, cer den 350 US 895, 76 Supreme Court 425,

100 Lawyers' Ed 787. Only the United States Court of Appeals for the Third Circuit has answered the question affirmatively. Thus, only the United States Court of Appeals for the Third Circuit has stated that an agent of the trustee may purchase property that is an asset of the bankrupt. This would seem to vitiate Section 29 of the Bankruptcy Act 18 USCA 1 Section 154 which reads as follows: "Whoever, being a Referee, Receiver, Trustee, Custodian, Marshall, or other officer of the Court, knowingly purchases, directly or indirectly, property of the Estate of which he is such an officer in a bankruptcy proceeding . . . shall be fined not more than $500 and shall forfeit his office which thereupon shall become vacant". The United States Court of Appeals for the Third Circuit made no attempt to distinguish the decisions of the Second Circuit or the Ninth Circuit. The United States Court of Appeals for the Third Circuit would seem to have ignored the admonition of the Sampsell case which says at page 811 "even if there is full disclosure, adequacy of consideration, absence or secret profit, an open judicial sale will not avail separately or in combination as a defense for such a fiduciary period. The prohibition is absolutely in the public interest. *It is established to protect the courts themselves from the suspicion of chicanery*". (Emphasis supplied).

CONCLUSION

For these reasons a writ of certiorari should issue to review the Judgment Order and the illegal procedure used in this case by the United States Court of Appeals for the Third Circuit.

Respectfully,

ISAIAH W. CRIPPINS
Counsel for Botany Industries, Inc.;
Counsel for Michael Daroff, Petitioners

BEST COPY AVAILABLE

I hereby certify on this 6th day of June, 1975, three copies of Petition for Writ of Certiorari were served to Adelman & Lavine, Attys-at-Law, 2 Penn Center Plaza, Suite 1900, Philadelphia, Pa. 19102, Counsel for Max Robb, trustee; and David Sykes, Esq., of Duane, Morris and Heckscher, 100 S. Broad St., Phila., Pa. 19110, Counsel for The First National Bank of Boston; and mailed certified return receipt requested to Hahn, Hessen, Margolis & Ryan, Counsel, 350 Fifth Ave., N. Y., N. Y. 10001, for Clarence Hafford

ISAIAH W. CRIPPINS
Counsel for Botany Industries, Inc.;
Counsel for Michael Daroff, Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 75-1032

In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., *Appellant*

(Bankruptcy Cause No. 72-273 E. D. Pa.)

Present: SEITZ, *Chief Judge*, ALDISERT and GARTH,
Circuit Judges.

ORDER

ORDERED that Appellant's motion for rehearing, which counsel advised the Clerk was to be sent to the panel only, is hereby denied.

By the Court,

COLLIN A. SEITZ
Chief Judge

DATED: March 6, 1975

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1032

In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc.,
Michael Daroff, *Appellants*

(Bankruptcy Cause No. 72-273, E. D. Pa.)

MOTION FOR REHEARING

TO THE HONORABLE, THE JUDGES OF THE SAID COURT:

COMES Now, the appellants, Botany Industries, Inc. and Michael Daroff, and allege as follows:

1. The Motion for Summary Affirmance was served on Appellants on January 8, 1975. (See Affidavit of January 16, 1975 by Antonia Daniel, attached to Answer to Motion for Summary Affirmance.)

2. An Order signed by Judge Aldisert, speeding up the entire Appellate process was issued on January 10, 1975.

3. A Motion to Vacate or Modify this Order was filed by appellants on January 16, 1975. This Motion was denied by the Court.

4. An answer to the Motion for Summary Affirmance was filed January 16, 1975.

5. Thus, it is apparent that when Judge Aldisert signed the Order to speed-up the Appellate process on January 10, 1975, he could not possibly have read the Answer to the Motion for Summary Affirmance.

6. When an Appellant Court, pursuant to Rule 26 of the Rules of Appellate Procedure, speeds up the judicial process, it must first determine as a matter of fact that an emergency exists or it has abused its discretion and deprived the Appellants of judicial due-process and equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution of the United States. This question was raised by the Appellants in their Motion to Vacate or Modify Order of January 10, 1975. Throughout the entire document, which was filed on January 16, 1975.

7. It was raised again in the Answer to Motion for Summary Affirmance beginning with the very first paragraph and continuing throughout the entire document.

8. Any careful perusal of the Answer to Motion for Summary Affirmance will show that a controversy existed between Mr. Sykes and Mr. Crippins as to whether or not any actual emergency existed or whether the emergency had been manufactured by Mr. Sykes, counsel for The First National Bank of Boston.

9. It is true that Appellate Courts do not take testimony except in the exercise of their original jurisdiction, but they can appoint Masters to take testimony for them. (See the case and Briefs in the case of United States *v.* Texas.)

10. No treatise or case in any U.S. Court upholds the procedure followed by the United States Court of Appeals for the Third Circuit in this case.

11. The above are sufficient reasons for a rehearing in this case. In addition, thereto, Judges Aldisert and Garth should have disqualified themselves from hearing

the Appeal on the Merits for they had erroneously found an emergency which did not exist and does not now exist, had received no factual information that was uncontroverted, therefore, they had, prior to the hearing on the Merits, deprived Appellants of procedural due process and equal protection of the laws guaranteed Appellants by the Fourteenth Amendment of the Constitution of the United States. These questions had been raised before this Court prior to the hearing of the Appeal on the Merits.

12. The writer of this Motion cannot believe that the Court carefully considered these points prior to the hearing on the Merits, for no mention was made by the Court at the hearing on the Merits and because the hearing on the Merits did not end until 1:00 P.M. on this Order and the Order affirming the Order of the lower Court was in the Clerk's office before 3:00 P.M.

13. On Page 2 of Exhibit "A" as filed in the Motion for Summary Affirmance, it can be seen "Hafford's obligations to the Bank shall not be terminated or affected if it is unable to obtain the financing necessary to pay the purchase price to the Trustee and First Boston unless, Hafford is excused from performance by reason of the concurrance or failure of fulfillment of any of the events specified in Paragraph 4 hereof". And, a close examination of Paragraph 4 will show that his offer is not contingent upon the financing of Bankers Trust. Mr. Clarence Hafford has been submitting offers since 1971 or before—each time at a lower offering price—and there is no reason why Clarence Hafford, Inc. cannot now defer closing until the Appellants have had an opportunity to present their case properly to the Court of Appeals and that Court has had a reasonable time to consider carefully the Merits of the Appeal. Glenoit Mills, Inc. has been, and continues to be, quite profitable. Hence, no loss would accrue to Clarence Hafford, Inc. for having waited.

It is understandable why the First National Bank of Boston would want to pressure the Court to issue a Summary Affirmance and hence avoid a thorough exposure of the basic facts underlying the Appeal. It is much less obvious why the Trustee, his attorneys and the attorney for the Creditor's Committee would join that Bank in these pressure tactics. For after all, the Trustee, after continuous and long urging by the Directors and Officers of Botany Industries, Inc., filed a twenty-five million dollar law suit against the First National Bank of Boston claiming that the bank illegally forced the bankruptcy of Botany Industries, Inc. Moreover, this writer sincerely doubts whether that Bank still deserves the status of a secured creditor as a result of its interference and intrusion in top management decision-making at Botany Industries, Inc. for many months prior to the filing under Chapter XI proceedings.

It therefore does not seem proper that the Court should be stampeded into a Summary Affirmance by the very bank that the Trustee and his counsel contend caused the bankruptcy in the first place."

14. Even if this Court refuses this Motion for Rehearing, the Appellants pray the Court to answer the following in it's Opinion, as well as give answers to the above.

I have already communicated with the office of Justice Brennan of the Supreme Court of the United States, but there is not to much that I can do until I see the Opinion of the Court of Appeals for the Third Circuit. Therefore, I would ask that as soon as possible, in view of the speeded-up process, that the Court issue such an Opinion.

The Court mentions that costs are assessed against the Appellant; since I represent two appellants, I should like to know how I am to allocate these costs? If the Court is allowing only one Appeal, I would like to know

why only one is included, and also some statement as to why not the other? Since the decision by your Court today flies in the teeth of the written Opinion of two other Circuits, I should like to know what distinctions if any, are being made, and for future guidance, why, and under what circumstances are such distinctions made? Specific answers to these questions would greatly aid me in my discussions with Justice Brennan's clerk, which are due to be heard tomorrow in Washington, D. C.

15. By getting the Courts eyes and minds focused on a manufactured emergency, the Court was misled by Counsel for the First National Bank of Boston and missed the gravamen of the real question in this case; *i.e.* Is Clarence Hafford an agent or sub-agent of the Trustee? If not, what is he? How could he be in possession of Glenoit Mills, Inc. and operate Glenoit Mills, Inc. if he is not an agent or sub-agent of the Trustee? He was a Director of Botany Industries, Inc. and a member of Botany Industries, Inc.'s Executive Committee. In light of all these things, which were mentioned in Appellants' Brief and flatly denied by the First National Bank of Boston, nevertheless, neither the First National Bank of Boston nor the U.S. Court of Appeals for the Third Circuit has answered the question of what is Mr. Hafford? Is he a trespasser? Or is he just a vicious interloper? The real question in this case is, how can a valid sale be made to Clarence Hafford or Hafford Inc., should not the lower Court have pierced the Corporate veil?

16. Since the Courts of Appeals of two Circuits have ruled against such a sale, why should the United States Court of Appeals for the Third Circuit ride off in a different direction.

17. For the reasons stated above, Appellants pray the United States Court of Appeals for the Third Circuit to reverse its Order of February 13, 1975 and grant Ap-

pellants the necessary relief prayed for in this Motion. And they shall forever pray.

Isaiah W. Crippins, Esquire
Counsel for Botany Industries, Inc.
Counsel for Michael Daroff,
Creditor of Botany Industries, Inc.

BEST COPY AVAILABLE

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Re: BOTANY INDUSTRIES, INC., Bankrupt

CERTIFICATE OF SERVICE

I, Isaiah W. Crippins, being duly authorized by Botany Industries, Inc. and by Michael Daroff, Creditor of Botany Industries, Inc., do hereby certify that I served on February 18, 1975, the Motion for Rehearing as follows:

1. David T. Sykes, 16th floor, 100 S. Broad St., Philadelphia, Penna., by directly to the person in charge of Mr. Sykes' office.

2. Sidney Chait, 1900 Two Penn Center Plaza, Philadelphia, Penna., by directly to the person in charge of Mr. Chait's office.

3. Stuart H. Savett, 1214 IVB Building, Philadelphia, Penna., by directly to the person in charge of Mr. Chait's office.

4. Lawrence King, 299 Park Avenue, New York, New York, on J.J.L. Hessen, 3700 Empire State Building, Fifth Avenue and 34th Street, New York, New York, by Registered Mail, Return Receipt Requested.

ISAIAH W. CRIPPINS, ESQ.
Counsel for Botany Industries, Inc.
Counsel for Michael Daroff,
Creditor of Botany Industries, Inc.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 75-1032

In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., *Appellant*

(Bankruptcy Cause No. 72-273, E. D. Pa.)

Argued February 13, 1975

Before SEITZ, *Chief Judge*, ALDISERT and GARTH, *Circuit Judges*

JUDGMENT ORDER

Upon consideration of all contentions raised by appellant, it is

ADJUDGED AND ORDERED that the order of the district court be and is hereby affirmed.

Costs taxed against appellant.

The certified judgment-order in lieu of formal mandate shall issue forthwith.

By the Court,

SEITZ
Chief Judge

Attest:

THOMAS F. QUINN
Clerk

DATED: February 13, 1975

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

C. A. Misc. Record No. 75-8002

No. 75-1032

In Re: BOTANY INDUSTRIES, INC., Bankrupt,
Botany Industries, Inc., Bankrupt,
Appellant

(D. C. No. B-72-273 In Bankruptcy)

Pursuant to the order of this Court, entered this date in the above-entitled case, the appellant is directed to deposit with the Clerk of this Court the requisite docketing fee of $50.00 for the docketing of this appeal not later than January 13, 1975; and

It is FURTHER ORDERED that briefs for the appellant and the appellees are to be hand filed and hand served in legible typewritten form, original and six copies, not later than January 20, 1975, with leave granted to each side to hand file and hand serve reply briefs in the form outlined above not later than January 24, 1975; and

It is FURTHER ORDERED that this case be listed for disposition on the merits during the week of February 10, 1975.

For the Court,

Clerk

DATED: January 10, 1975

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BOTANY INDUSTRIES, INC. IN BANKRUPTCY
BANKRUPT

No. 72-273

ORDER

AND Now, this second (2nd) day of December 1974, upon consideration of the Record on Appeal, and oral argument by appellant and counsel for appellees heard on November 27, 1974, it is hereby

ORDERED AND DECREED that the Appeal of Michael Daroff from the Order of Bankruptcy Judge Emil F. Goldhaber dated October 7, 1974, approving the sale of the stock of Glenoit Mills, Inc., to Clarence Hafford, Inc., for the total consideration of $6,737,500 be, and it is hereby, dismissed, with prejudice.

By the Court

JOHN MORGAN DAVIS
J.

Supreme Court, U. S.
FILED
JUL 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975.

No. 74-1528.

BOTANY INDUSTRIES, INC. and MICHAEL DAROFF,
Petitioners,

v.

THE FIRST NATIONAL BANK OF BOSTON
and
MAX ROBB, TRUSTEE IN BANKRUPTCY OF BOTANY INDUSTRIES, INC.
and
STATUTORY CREDITORS COMMITTEE OF BOTANY INDUSTRIES, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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July 3, 1975

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IN THE

Supreme Court of the United States

—

OCTOBER TERM, 1975.

—

No. 74-1528.

—

BOTANY INDUSTRIES, INC.

AND

MICHAEL DAROFF,

Petitioners,

v.

THE FIRST NATIONAL BANK OF BOSTON

AND

MAX ROBB, TRUSTEE IN BANKRUPTCY OF BOTANY INDUSTRIES, INC.

AND

STATUTORY CREDITORS COMMITTEE OF BOTANY INDUSTRIES, INC.,

Respondents.

—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

———

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

(a) The Order of the Bankruptcy Court of October 7, 1974 is not reported. It is appended hereto, as it was not included in the Petition (A1).

(b) The Order of the District Court of December 2, 1974 is set forth as Appendix E to the Petition. No Opinion was issued.

(c) The Judgment Order of the Court of Appeals for the Third Circuit is set forth as Appendix C to the Petition. No Opinion was issued, as indicated at 511 F. 2d 1392. A motion for rehearing was denied on March 6, 1975, as set forth in Appendix A to the Petition.

JURISDICTION.

The jurisdictional requisite is adequately set forth in the Petition.

STATUTES AND RULES INVOLVED.

Petitioners draw into question a procedure of court governed by a provision of the Internal Operating Procedures for the United States Court of Appeals for the Third Circuit (Operating Procedure No. Q.5 at 24 of the Internal Operating Procedures of the United States Court of Appeals for the Third Circuit):

Q. MOTION PRACTICE.

5. *Motion to Dismiss Appeal.* A motion to dismiss an appeal may be granted by a motion panel. If the motion panel is of the view that the motion for dismissal not be granted, the motion is referred by

order, without decision or without prejudice, to the panel which will determine the appeal on the merits.

Petitioners also allege, and Respondents dispute, that this case involves a provision of the criminal code (Act of June 25, 1948, 62 Stat. 690 (18 U. S. C. § 154)):

> Whoever knowingly acts as a referee in a case in which he is directly or indirectly interested; or
>
> Whoever, being a referee, receiver, custodian, trustee, marshal, or other officer of the court, knowingly purchases, directly or indirectly, any property of the estate of which he is such officer in a bankruptcy proceeding; or
>
> Whoever being such officer, knowingly refuses to permit a reasonable opportunity for the inspection of the documents and accounts relating to the affairs of estates in his charge by parties in interest when directed by the court to do so—
>
> Shall be fined not more than $500, and shall forfeit his office, which shall thereupon become vacant.

QUESTIONS PRESENTED.

1. Whether a United States Court of Appeals may summarily affirm a Judgment Order of a lower court.

2. Whether an agent or sub-agent of a trustee in bankruptcy may validly purchase an asset of the bankrupt corporation administered by the agent or sub-agent.

STATEMENT OF THE CASE.

Botany Industries, Inc. ("Botany") is presently in bankruptcy under the jurisdiction and control of the Bankruptcy Court for the Eastern District of Pennsylvania. Its assets are being sold and otherwise liquidated by the Trustee, Max Robb, for the benefit of the estate.

One asset of Botany was all of the issued and outstanding shares of its subsidiary Glenoit Mills, Inc. ("Glenoit"). However, these shares were pledged to, and held by, The First National Bank of Boston (the "Bank"), for itself and as agent for several other financial institutions, as collateral for various loans (R. 7).

The Trustee and the Bank determined to sell the Glenoit stock. Pursuant to Bankruptcy Rule 606(a) an appraisal of the stock was ordered. This appraisal was filed of record with the Bankruptcy Court on March 22, 1974 showing a value of $6,242,260 (R. 38). Of the offers received for the stock, that of Clarence Hafford, Inc. ("Hafford, Inc.") was the highest. It *exceeded* the appraised value of the stock by $495,240, or approximately 8% (R. 16). On August 9, 1974 the Bank and the Trustee therefore applied to the Bankruptcy Court for approval of the sale to Hafford, Inc. (R. 5-10).

Hafford, Inc. is a Delaware corporation, a controlling interest of which is owned by the management of Glenoit (R. 164). Clarence Hafford is the president of Glenoit.

A hearing on the application to sell the stock was scheduled for October 7, 1974 before the Bankruptcy Judge. Notice of the proposed sale and hearing was published in the *Wall Street Journal* (R. 42) and the *Daily News Record* (R. 41) on September 13, 1974, and sent to all Botany creditors on September 26, 1974 (R. 43).

On October 7, 1974 the sale of the stock to Hafford, Inc. was authorized by Order of the Bankruptcy Judge after receiving no higher bids before, or at, the scheduled hearing (A1-A4).

An appeal from the Order was taken to the District Court by Michael Daroff, one of the present petitioners. Botany was not a party to that appeal. A Brief was filed by the present Respondents, and a "Statement of Issues" was submitted by Mr. Daroff. Oral argument was heard on November 27, 1974. On December 2, 1974, an Order was entered in the District Court for the Eastern District of Pennsylvania dismissing Mr. Daroff's appeal with prejudice (Appendix E to the Petition).

An appeal was then taken to the United States Court of Appeals for the Third Circuit, not by Mr. Daroff, who was the appellant below, but by Botany.

The present Respondents filed both a Motion for Immediate Docketing of Appeal, Expedited Decision and Related Relief, and a Motion for Summary Affirmance (A5-A7). These represented the movants' response to what they saw as an appeal, wholly without merit and brought by a party without standing, being used to hinder the sale of the Glenoit stock. Joint answers were filed to both motions by counsel for Botany and Mr. Daroff.

On January 10, 1975 a panel of the Third Circuit ruled on the two motions. The Motion for Summary Affirmance was "referred to merits panel." (A7).

On January 13, 1975 disposition of the case on the merits was listed for February 13, 1975. Both parties then filed briefs and reply briefs directed to the merits.

Oral argument was heard on the morning of February 13, 1975, and that afternoon a Judgment Order issued (Appendix C to the Petition).

ARGUMENT.

I. As Summary Affirmance Was Not Granted Below, There Is No Case or Controversy To Be Decided.

The first of Petitioners' two questions asks "[w]hether or not there is such a *rari avis* as a motion of summary affirmance by a United States Court of Appeals of a Judgment Order of a lower court." Because Petitioners did not brief this issue it is difficult to determine the precise intent of the question. Presumably, however, Petitioners mean to ask whether it is proper for a Court of Appeals to *grant* a motion for summary affirmance of a lower court order.

Although a motion for summary affirmance is not specifically mentioned in either the Federal Rules of Appellate Procedure or the Local Rules of the Court of Appeals for the Third Circuit, it is addressed by the Local Rules of several other Courts of Appeals.[1] An inspection of these Local Rules shows that a motion to dismiss an appeal is generally handled in a similar, or even identical, manner to a motion for summary affirmance. This is not unexpected as the two motions are all but functional equivalents. Where an appeal is frivolous and wholly without merit, it is entirely proper that it be dismissed, *Harkins v. Eldredge*, 505 F. 2d 802 (8th Cir. 1974). In a similar situation, it should likewise be proper to summarily affirm an order of the court below.

Notwithstanding that the Third Circuit Court of Appeals does not have a specific rule addressing motions for summary affirmance, it does have an internal operating procedure covering the analagous motion to dismiss. This

1. § 27(a) of the Rules for the Second Circuit; Rule 8 of the Rules for the Sixth Circuit; Circuit Rule 22 of the Rules for the Seventh Circuit; Rule 9(b) of the Rules for the Eighth Circuit; and Rule 8 of the Rules for the Tenth Circuit.

operating procedure is set forth in full above under "Statutes and Rules Involved." As can be seen, if the motion to dismiss is not to be granted it is referred to the merits panel.

A reading of the Court's order of January 10, 1975 (A7), indicates that Respondents' Motion for Summary Affirmance was *not* granted, but instead was "referred to merits panel," presumably in compliance with Internal Operating Procedure Q.5.

This Court, therefore, should not consider the propriety of a Court of Appeals granting summary affirmance. Any such consideration would necessarily involve an improper advisory opinion, as the Motion was decided in *Petitioners'* favor below, and there is, therefore, no present case or controversy. Furthermore, because the Motion for Summary Affirmance was not granted below, any decision by this Court on the propriety of granting such a motion would not affect the rights of the litigants. This Court is, therefore, without power to render such an opinion. *St. Pierre v. United States*, 319 U. S. 41 (1943).

II. Whether or Not an Agent or Sub-Agent of a Trustee May Purchase the Bankrupt's Assets, the Purchaser Here Was Not Such an Agent or Sub-Agent.

The second question presented by Petitioners raises the issue of who can purchase the assets of a bankrupt corporation, and more specifically, whether "an agent or sub-agent of a trustee in bankruptcy [may] validly buy an asset of the bankrupt corporation administered by the agent or sub-agent of the trustee." (Petition at 2).

The record shows that the purchaser, Hafford, Inc., is a corporation controlled by the management of Glenoit. On this level alone, it is clear that Petitioners' question does not relate to the facts. Hafford, Inc. is not, and never

has been, an agent or sub-agent of the Trustee. There is nothing in the record regarding Hafford, Inc. except that it is a corporation, controlled by the Glenoit management, which presented the highest offer for the Glenoit stock.

Perhaps Petitioners confuse Hafford, Inc. with Clarence Hafford, the individual, who is President of Glenoit. Respondents, however, do not rely solely on this legal distinction, for even Clarence Hafford would be a proper purchaser of the Glenoit stock.

The record shows only that Mr. Hafford is an officer of Glenoit, which is a subsidiary of Botany, the bankrupt corporation. He was never appointed by the Bankruptcy Court to serve as an agent or sub-agent. No case cited by Petitioners, or known to Respondents, holds that such an individual either owes a fiduciary duty to creditors of the parent corporation, or is an agent or sub-agent of the trustee of the parent corporation. Nor do any cases indicate that such an individual, much less a corporation he may control, cannot purchase assets of the bankrupt parent. In other words, the conflict between Circuits that Petitioners attempt to create simply does not exist.

Petitioners first cited case is *Wolverton v. Shell Oil Company*, 442 F. 2d 666 (9th Cir. 1971).[2] Even a cursory examination shows that the facts in *Wolverton* are entirely different from those relating to the Glenoit stock sale.

Wolverton affirms an order setting aside a private sale by a trustee in bankruptcy to the bankrupt himself. Although acknowledging that a sale to the bankrupt is not *per se* unlawful, the Court holds that such a sale must be closely scrutinized as it "offers opportunity for skulduggery

2. It should be noted that *Wolverton* was decided by the *Ninth* Circuit, not the *Second* Circuit as cited by Petitioners. Since Petitioners' only other cited case was also decided by the Ninth Circuit, there is even less support than Petitioners would have this Court believe for the proposition that there is a conflict of decision among Circuits.

that make it suspect." *Id.* at 669. As there was no notice to creditors of the sale, nor an order for sale without notice, *Wolverton* holds that the sale was properly set aside. This case bears no relationship to the present facts.

The foundation of *Wolverton* is that the sale was conducted without notice to creditors. All creditors of Botany had written notice of the proposed sale of the Glenoit stock to Hafford, Inc. Furthermore, notice was published in the *Wall Street Journal* and the *Daily News Record*. The Bankruptcy Court in its Order found explicitly that proper notice had been given (A2).

Furthermore, *Wolverton* concerns the sale of assets to the bankrupt himself. In the present case the sale is not to the bankrupt, but to an independent corporation the stock of which is owned by the management of a solvent subsidiary of the bankrupt. The very bases of *Wolverton* are, therefore, simply inapplicable to the present facts.

Petitioners' second case, *Donovan & Schuenke v. Sampsell*, 226 F. 2d 804 (9th Cir. 1955), *cert. den.* 350 U. S. 895 (1955), is also clearly distinguishable. *Sampsell* holds as void the sale of assets to a bankrupt company's president, who had been appointed by order of the Referee as the "exclusive agent and representative of the trustee" *Id.* at 808, and for which services he was authorized to receive payment. In essence, *Sampsell* holds that someone in such a position owes a fiduciary duty to creditors which makes him ineligible as a purchaser of the bankrupt's assets.

The facts clearly distinguish the present case from *Sampsell*. Neither Clarence Hafford nor the purchaser, Hafford, Inc., is president of the bankrupt corporation, Botany Industries, Inc. The record shows only that Mr. Hafford is a member of the management of Botany's solvent subsidiary Glenoit, but as such, he is neither an agent nor representative of the trustee, whether by specific court

order as in *Sampsell,* or otherwise. Petitioners cite no cases that indicate otherwise. Furthermore, neither Mr. Hafford nor Hafford, Inc. have received compensation from the trustee, nor are they authorized to do so. The facts of record simply do not fit the *Sampsell* mold.

A word should also be said concerning 18 U. S. C. § 154, which is referred to in the Petition and set forth above under "Statutes and Rules Involved." This section of the criminal code forbids the purchase by certain parties of the assets of a bankrupt estate. Consideration of this provision, however, is wholly improper, for as pointed out in *Sampsell* itself, a civil case is not the proper forum to decide "the inclusionary and exclusionary limits of the words used in the Act [18 U. S. C. § 154]." 226 F. 2d at 808. Moreover, this statute has not once been raised before in these proceedings. And finally, of course, the statute is inapplicable to the present facts because neither Mr. Hafford nor Hafford, Inc. is "a referee, receiver, custodian, trustee, marshal, or other officer of the court. . . ." 18 U. S. C. § 154.

III. There Is No Important Question of Federal Law.

That there is no important question of federal law at stake is manifestly obvious from the Petition itself. Petitioners cite just two cases, neither of which is factually similar to the present situation. The issue of who may or may not purchase a bankrupt's assets is clearly not one subject to frequent litigation that would benefit from the clarification of a Supreme Court decision.

Respondents respectfully submit that the matter is of little moment nationally, involves no grave question of constitutional law, and is ill founded for consideration by the Supreme Court.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

July 3, 1975.

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Appendix.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

In Bankruptcy No. 72-273.

IN RE

BOTANY INDUSTRIES, INC.,

Bankrupt.

ORDER.

AND NOW, this 7th day of October, 1974, upon consideration of the foregoing application of Max Robb, Trustee in Bankruptcy of Botany Industries, Inc. ("Trustee"), for authority to sell at private sale, free and clear of all liens (including tax liens), claims, encumbrances, demands, security interests and rights of creditors or any other party or person with the exception of and subject to the lien of the pledge in favor of The First National Bank of Boston, et al. ("First Boston") (a Substitution Agreement and Stipulation with the District Director of Internal Revenue Service, Manhattan District, New York, having been approved, or will be presented for approval, by the Court, whereby the capital stock of Glenoit Mills, Inc. and all of its property will be transferred free and clear of all of the tax claims and/or all of the tax liens in favor of the United States, as described in the Substitution Agreement and Stipulation, which Substitution Agreement and Stipulation is incorporated hereby by reference), all of the Trustee's right, title, interest, and equity of redemption, and all of the right, title and interest and equity of re-

demption of Botany Industries, Inc. ("Botany") in and to all of the issued and outstanding capital stock of Glenoit Mills, Inc., and notice of the hearing thereon having been given to all creditors and parties in interest with opportunity to make a better bid and offer for the property, and a hearing having been held thereon before this Court with full opportunity to creditors and parties in interest to object or to make a better bid and offer, and it appearing that a private sale of the Trustee's right, title, interest and equity of redemption, free and clear of liens (including tax liens) and encumbrances for the consideration hereinafter stated, is fair and reasonable and is more than could be realized at a public sale, and it appearing that the joint sale contemplated by the Hafford offer and proposal is commercially reasonable, and it appearing that there is no valid objection to the transfer of the Trustee's right, title, interest and equity of redemption, and to the transfer of the interest of the pledgee, in and to the shares of stock to a purchaser at private sale, and that the approval of the proposed joint sale is in the best interests of creditors, it is

ORDERED AND DECREED:

1. That the offer and proposal of Clarence Hafford, Inc. ("Hafford") to purchase all of the issued and outstanding shares of capital stock of Glenoit Mills, Inc. ("Glenoit"), a copy of which is attached to the foregoing application, is approved and confirmed, and Max Robb, Trustee in Bankruptcy of Botany Industries, Inc. ("Trustee") is hereby authorized and empowered to do and perform all acts and things necessary and proper to carry out all the terms and conditions thereof.

2. Trustee is hereby authorized, empowered and directed, upon receipt of the full consideration of the amount of $250,000.00, to sell, transfer and assign, at private sale, to Hafford, all of his and Botany's right, title, interest and equity of redemption in and to 175 shares of capital stock of Glenoit, being all of the issued and outstanding capital stock thereof, free and clear of all liens (including tax liens), claims, encumbrances, demands, security interests, and rights of the Trustee, and Estate of Botany Industries, Inc. and creditors or any other party or person, with the exception of and subject to the lien of the pledge in favor of The First National Bank of Boston, Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company of America, Massachusetts Mutual Life Insurance Company and The Mutual Benefit Life Insurance Company (hereinafter collectively referred to as "First Boston, et al.").

3. The First National Bank of Boston, pursuant to the provisions of Bankruptcy Rule 306(d), is authorized to consummate the transaction contemplated by the offer and proposal of Hafford in accordance with its terms and conditions, and is herewith authorized to sell, assign and transfer to Hafford the said 175 shares of the capital stock of Glenoit Mills, Inc., free and clear of all liens, claims, encumbrances, demands, security interests and rights of creditors or any other party or person (except for the rights of the Trustee under the Hafford offer and proposal); and the value of the security interest held by The First National Bank of Boston, Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company of America, Massachusetts Mutual Life Insurance Company and The Mutual Benefit Life Insurance Company, is herewith adjudged and determined to be $6,487,500 and the aggregate of their unsecured deficiency claims shall be allowed only to the extent the claims are enforceable for any excess of the claims over such amount.

4. The joint sale contemplated by the Hafford offer and proposal and hereby approved is adjudged to be commercially reasonable and shall constitute a sale of all of the issued and outstanding shares of capital stock of Glenoit Mills, Inc., free and clear of all liens, claims, encumbrances, demands and security interests of any nature whatsoever.

5. The sale of the capital stock of Glenoit Mills, Inc. to Hafford does not include and does not carry with it any claim, right or demand by Glenoit Mills, Inc. against the Estate of Botany Industries, Inc. or any of its subsidiary corporations; nor does the Estate of Botany Industries, Inc. or any of its subsidiary corporations retain any claim, right or demand against Glenoit Mills, Inc. Any and all such claims, rights or demands by Glenoit Mills, Inc. against the Estate of Botany Industries, Inc. or any of its subsidiary corporations or by the Estate of Botany Industries, Inc. or any of its subsidiary corporations against Glenoit Mills, Inc., now or heretofore existing, are herewith canceled and extinguished.

6. This Court herewith retains jurisdiction to adjudicate all claims which may arise between the Trustee and First Boston and Hafford.

7. The Trustee is herewith authorized and directed to invest the proceeds of the sale in interest-bearing certificates of deposit issued by an approved local bank depository or depositories; and to hold same pursuant to the provisions of the Substitution Agreement and Stipulation referred to above, and not to be withdrawn, other than for reinvestment, except upon Order of this Court.

s/ EMIL F. GOLDHABER,
Bankruptcy Judge.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.

January 9, 1975

C. A. Misc. Record No. 75-8002

IN RE: BOTANY INDUSTRIES, INC.,
Bankrupt

BOTANY INDUSTRIES, INC., BANKRUPT,
Appellant

(D. C. No. B-72-273 In Bankruptcy)

Present: ALDISERT, WEIS and GARTH, *Circuit Judges.*

1. Motion by appellees, The First National Bank of Boston ("First Boston"), for itself and as agent for Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company, and Mutual Benefit Life Insurance Company (the "financial institutions"); Max Robb, Trustee in Bankruptcy, of Botany Industries, Inc. ("Trustee"); and The Statutory Creditors

Committee of Botany Industries, Inc., pursuant to Rule 2, 11(d) and 27 F. R. A. P.,

(1) for immediate docketing of appeal,

(2) for reduction of time for transmitting record to the Court of Appeals and for hearing on original record without an appendix,

(3) for reduction of time for filing and service of all briefs, for filing and service by hand, and for typewritten briefs (appellant and appellees to file and serve briefs 10 (ten) days from date of docketing of appeal),

(4) for early argument on the appeal,

(5) for expedited decision on the appeal,

with Exhibits A, B, C, D and E, and Affidavit of Sidney Chait, Esquire, counsel for Max Robb, Trustee in Bankruptcy of Botany Industries, Inc.,

2. Motion by appellees, The First National Bank of Boston ("First Boston"), for itself and as agent for Philadelphia National Bank, Central Penn National Bank, First National State Bank of New Jersey, State Mutual Life Assurance Company, and Mutual Benefit Life Insurance Company (the "financial institutions"); Max Robb, Trustee in Bankruptcy, of Botany Industries, Inc. ("Trustee"); and The Statutory Creditors Committee of Botany Industries, Inc., for summary affirmance of the Order of Judge John Morgan Davis dated December 2, 1974, dismissing the appeal of Michael Daroff from the Order of Bankruptcy Judge Emil F. Goldhaber dated October 7, 1974, approving the sale of the common stock of Glenoit Mills, Inc., to

Clarence Hafford, Inc., with Exhibits A, B, C and D, and Affidavit of Sidney Chait, Esquire,

in the above-entitled case.

Respectfully,

THOMAS F. QUINN,
Clerk.

enc.
fm

The foregoing motions 1(1)(2)(3) are granted; the Clerk to implement accordingly; motions 1(4)(5) are referred to merits panel.

Motion 2 is referred to merits panel.

By THE COURT,

/s/ ALDISERT,
Circuit Judge.

Dated: January 10, 1975